

**FILED**

AUG 13 2014

RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL GEORGE PENA,

Petitioner,

v.

J. SOTO, Warden,

Respondent.

No. C 14-02195 BLF (PR)

**ORDER TO SHOW CAUSE**

Petitioner, a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state conviction. Petitioner has paid the filing fee.

**BACKGROUND**

According to the petition, Petitioner was found guilty of attempted murder along with an enhancement for firearm use resulting in great bodily injury by a jury in Santa Clara County Superior Court. (Pet. at 2.) Petitioner was sentenced to thirty-two years to life in state prison. (*Id.* at 1.)

Petitioner appealed his conviction, and the state appellate court affirmed. (Pet. at 3.) The state high court denied review in 2013. (*Ibid.*)

1 Petitioner filed state habeas petitions for writ of habeas corpus, with the  
2 California Supreme Court denying review on August 14, 2013. (*Id.* at 4.) Petitioner  
3 filed a petition for writ of certiorari in the United States Supreme Court, which  
4 denied review on March 10, 2014. (*Ibid.*)

5 Petitioner filed the instant federal habeas petition on May 13, 2014.

## 6 7 DISCUSSION

### 8 A. Standard of Review

9 This court may entertain a petition for a writ of habeas corpus “in behalf of a  
10 person in custody pursuant to the judgment of a State court only on the ground that  
11 he is in custody in violation of the Constitution or laws or treaties of the United  
12 States.” 28 U.S.C. § 2254(a).

13 It shall “award the writ or issue an order directing the respondent to show  
14 cause why the writ should not be granted, unless it appears from the application that  
15 the applicant or person detained is not entitled thereto.” *Id.* § 2243.

### 16 B. Legal Claims

17 Petitioner claims the following ground for federal habeas relief: (1) the trial  
18 court erred by not instructing the jury to consider the less serious offenses of  
19 voluntary and attempted voluntary manslaughter; (2) ineffective assistance of  
20 counsel for failing to ask the court to instruct on completed and attempted voluntary  
21 manslaughter; and (3) ineffective assistance of counsel for failing to request self-  
22 defense instructions. Liberally construed, these claims are cognizable under § 2254  
23 and merits an answer from Respondent.

## 24 25 CONCLUSION

26 For the foregoing reasons and for good cause shown,

27 1. The Clerk shall serve by certified mail a copy of this order and the  
28 petition and all attachments thereto on Respondent and Respondent’s attorney, the

1 Attorney General of the State of California. The Clerk also shall serve a copy of this  
2 order on Petitioner.

3 2. Respondent shall file with the court and serve on petitioner, within  
4 **sixty (60) days** of the issuance of this order, an answer conforming in all respects to  
5 Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of  
6 habeas corpus should not be issued. Respondent shall file with the answer and serve  
7 on Petitioner a copy of all portions of the state trial record that have been transcribed  
8 previously and that are relevant to a determination of the issues presented by the  
9 petition.

10 If Petitioner wishes to respond to the answer, he shall do so by filing a  
11 traverse with the Court and serving it on Respondent within **thirty (30) days** of his  
12 receipt of the answer.

13 3. Respondent may file a motion to dismiss on procedural grounds in lieu  
14 of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules  
15 Governing Section 2254 Cases. If Respondent files such a motion, Petitioner shall  
16 file with the Court and serve on Respondent an opposition or statement of non-  
17 opposition within **twenty-eight (28) days** of receipt of the motion, and Respondent  
18 shall file with the court and serve on Petitioner a reply within **fourteen (14) days** of  
19 receipt of any opposition.

20 4. Petitioner is reminded that all communications with the court must be  
21 served on Respondent by mailing a true copy of the document to Respondent's  
22 counsel. Petitioner must also keep the Court and all parties informed of any change  
23 of address.

24 **IT IS SO ORDERED.**

25  
26 DATED: Aug 13, 2014

  
27 BETH LABSON FREEMAN  
28 United States District Judge